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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VICTOR GUERRERO MENDEZ, Defendant and Appellant.	D073940 (Super. Ct. No. SCS292732)

APPEAL from a judgment of the Superior Court of San Diego County, Dwayne K. Moring, Judge. Affirmed.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Victor Guerrero Mendez guilty of 16 counts of committing lewd acts on a child under the age of 14 years (Pen. Code, § 288, subd (a)),[1] with the further finding on each count that Mendez committed the crimes against more than one victim (§ 667.61, subds. (b), (c), (e); § 1203.066, subd. (a)(7).) The trial court imposed an indeterminate prison sentence of 45 years to life.

First, Mendez contends that his right to due process was violated because the trial court instructed the jury with CALCRIM No. 1191A, which informed the jury it could use uncharged acts of molestation as propensity evidence to conclude Mendez committed the charged acts of molestation if it found the uncharged acts to be true based on a preponderance-of-the-evidence standard of proof. Mendez contends that when, as here, the evidence of the *uncharged* acts is presented through the testimony of the victims of the *charged* acts, CALCRIM No. 1191 has the effect of lowering the beyond-a-reasonable-doubt standard of proof for the charged crimes. Mendez also contends that the trial court's imposition of a sentence of 45 years to life constitutes cruel and unusual punishment in violation of the California and United States constitutions in light of the nature of his crimes, his advanced age and his lack of prior criminal history.

We conclude that Mendez's contentions lack merit, and accordingly we affirm the judgment.

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Mendez has three granddaughters all of whom were taken care of before and after school in Mendez's home by Mendez and their grandmother. In February 2017, all three granddaughters disclosed to adult family members that Mendez had been sexually molesting them over the course of several years.

The youngest granddaughter (granddaughter 1), who was 12 years old during trial, testified that when she was 10 and 11 years old, on several occasions Mendez performed each the following acts of molestation: (1) coming up behind her in the kitchen or on the patio and either placing his hand on her buttocks or grabbing her waist and pulling her towards him as he pressed his genitals against her buttocks; (2) placing his hand on her upper thigh while she was sitting next to him in the car; (3) putting his hand down her pants and touching her genitals when she was in the bedroom or on the patio; and (4) touching her breasts.

The middle granddaughter (granddaughter 2), who was 16 years old during trial, testified that Mendez performed the following acts: (1) when she was in middle school and high school, slapping her buttocks on numerous occasions in the kitchen or on the patio, and on some occasions touching her genital area as well; (2) when she was in sixth grade, touching her genitals when he was waking her up from a nap; (3) when she was in elementary and middle school, touching her breasts over her clothing in the bedroom, along with making multiple unsuccessful attempts to touch her breasts under her shirt;

and (4) when she was in middle school, pulling out his penis and telling her to touch it while grabbing her hand.

The oldest granddaughter (granddaughter 3), who was 18 years old during trial, testified that Mendez started to molest her when she was 10 years old and in fifth grade. She testified to the following acts: (1) starting when she was in fifth grade and continuing through middle school, coming up from behind her in the kitchen or on the patio and grabbing her waist as he rubbed his genitals on her buttocks; (2) touching her breasts on the patio from fifth grade to eighth grade; (3) touching her genital area while on the patio; (4) touching her upper thigh when sitting next to her on the couch while attempting to reach her genitals; (5) putting his hand on her upper inner thigh when sitting next to her in the car when she was learning to drive at age 16 or 17; and (6) in the car, grabbing her hand and attempting to put it on his genitals.

Mendez testified at trial. He denied that he ever touched any of his granddaughters in a sexual manner, but he did admit to slapping their buttocks and touching their thighs, which he explained was done under innocent circumstances.

As trial began, the amended information charged Mendez with 21 counts of committing a lewd act upon a child under the age of 14 years. Counts 1 through 7 pertained to specific acts against granddaughter 1. Counts 8 through 13 pertained to specific acts against granddaughter 3. Counts 14 through 21 pertained to specific acts against granddaughter 2. During trial, in response to a defense motion under section 1118.1, which was later withdrawn, the People dismissed counts 12 and 13. Those counts both alleged touching of granddaughter 3's genitals on the patio, but the

People had failed to solicit testimony establishing that granddaughter 3 was under the age of 14 during those acts.[2]

The jury returned a guilty verdict on all of the counts except for counts 4, 7, and (renumbered) 17 on which they were unable to reach a verdict. The trial court declared a mistrial on those counts, and the People dismissed them.

At sentencing, the trial court considered and rejected Mendez's argument that sentencing him to prison for a term of 90 years to life as requested by the People, or 45 years to life as recommended by the probation officer, would constitute cruel and unusual punishment in light of Mendez's age of nearly 70 years and his lack of any prior criminal record. The trial court imposed a prison term of 45 years to life, composed of three consecutive terms of 15 years to life pertaining to each of the three victims, with the sentences for all of the other counts ordered to run concurrently.

II.

DISCUSSION

A. *Instructing the Jury With CALCRIM No. 1191A Did Not Violate Mendez's Right to Due Process*

We first consider Mendez's contention that his right to due process was violated when the trial court instructed the jurors that in determining Mendez's guilt for the charged offenses against a specific victim they could consider uncharged acts of molestation committed by Mendez against that same victim if they found by a

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2 After the People dismissed counts 12 and 13, the trial court renumbered the counts as indicated on the verdict forms to prevent confusion.

preponderance of the evidence that the uncharged acts occurred. According to Mendez, this instruction, which was set forth in CALCRIM No. 1191A, had the effect of unconstitutionally lowering the burden of proof for the charged offenses, which must be proven beyond a reasonable doubt.

During trial, the jury heard testimony from each of the granddaughters about several acts of molestation that were not charged as crimes in this case. The uncharged acts described by granddaughter 1 included Mendez touching her breasts, and touching her buttocks and thigh on additional occasions. The uncharged acts described by granddaughter 2 included Mendez displaying his penis and attempting to have her touch it. The uncharged acts described by granddaughter 3 included lewd acts that may have been performed after she turned 14 years old, and instances of touching her buttocks and breast that occurred in elementary school.[3] As the trial court properly ruled, and Mendez does not contest, Evidence Code section 1108 made the evidence of the uncharged acts admissible in this case as evidence of Mendez's propensity to commit the charged sexual offenses.[4] Case law holds that an uncharged offense admitted under Evidence Code

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3 Among other things, the uncharged acts of molestation included the two lewd act counts pertaining to the touching of granddaughter 3's genitals on the patio, which the People dismissed during trial due to lack of evidence of granddaughter 3's age at the time those acts occurred.

4 As stated in Evidence Code section 1108, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] [s]ection 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).)

section 1108 need only be proven by a preponderance of the evidence. (E.g., *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1061.)

CALCRIM No. 1191A sets forth an instruction to be used when a jury hears evidence of uncharged sexual offenses that are admitted pursuant to Evidence Code section 1108. Over defense counsel's objection that the instruction "invites the jury to apply a different burden of proof to the charges" and is "very confusing," the trial court instructed the jury with CALCRIM No. 1191A as follows:

> "The People presented evidence that the defendant committed the uncharged crimes of Annoying or Molesting a Minor and Lewd or Lascivious Act on a Child Under the Age of 14. These crimes are defined for you in these instructions.
>
> "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.
>
> "If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> "If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit Lewd or Lascivious Act on a Child Under the Age of 14 as charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of

> Lewd or Lascivious Act on a Child Under the Age of 14. The People must still prove each charge and allegation beyond a reasonable doubt."[5]

Mendez contends that this instruction violates a defendant's right to due process in the situation in which the evidence of the uncharged sexual offenses is contained solely in the testimony of the victim who is also the victim of the charged sexual offenses. According to Mendez, the instruction improperly directs the jury to judge the credibility of the victim's testimony by a preponderance of the evidence standard, which effectively lowers the standard by which the jury judges the credibility of the victim's testimony regarding the charged sexual offenses, in contravention of the principle that guilt must be proven beyond a reasonable doubt. Mendez argues that standard of proof for the charged crimes was effectively lowered because the instruction improperly "authorized the jury to ascribe a lesser standard of truthfulness to the sole witnesses to the offenses in the case." Mendez contends that "the appropriate standard of proof necessary to prove the commission [of] *uncharged* acts committed against the named victims for the purposes of proving propensity under [Evidence Code] section 1108, particularly when the victims

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[5] The jury was also instructed with CALCRIM No. 1191B, which pertains to the jury's consideration of *charged* sex offenses by the defendant pursuant to Evidence Code section 1108. CALCRIM No. 1191B makes clear that the jury may use the additional charged sex offense to conclude that the defendant was disposed or inclined to commit a charged sex offense only if it finds beyond a reasonable doubt that the defendant committed the additional charged sex offense.

are sole witnesses to the acts and provide only generic testimony,"[6] should be the "beyond a reasonable doubt standard." According to Mendez, "[t]he determination of whether a sole complaining witness is credible should be based on a *single* standard of proof—beyond a reasonable doubt." (Italics added.)

"The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid [instructing in such a way] as to lead the jury to convict on a lesser showing than due process requires." (*Victor v. Nebraska* (1994) 511 U.S. 1, 22.) "The constitutional question . . . is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [beyond-a-reasonable-doubt] standard." (*Id.* at p. 6; see *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1246 [inquiry for a claim of instructional error is "whether there is a reasonable likelihood the jurors would have understood the instructions in a manner that violated a defendant's rights"].) " 'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the

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6 By "generic testimony," Mendez is referring to testimony from a victim that generally describes the defendant's acts, how often those acts occurred, and how old the victim was at the time, rather than pinpointing a specific act that occurred on a specific date. (See, e.g., *People v. Jones* (1990) 51 Cal.3d 294, 299 [discussing "generic" testimony, in which "the victim typically testifies to repeated acts of molestation occurring over a substantial period of time[] but lacking any meaningful point of reference"].) Because each victim gave generic testimony that certain acts of molestation occurred on numerous occasions over a period of time, but Mendez was only charged with a limited number of instances of committing that type of act against each victim (such as the "first" and "last" of such acts), the remaining occurrences were uncharged acts to which the jury could have applied a preponderance of the evidence standard of proof.

defendant. [Citations.]' [Citation.] ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " (*People v. Solomon* (2010) 49 Cal.4th 792, 822.) Moreover, in assessing whether jury instructions were erroneous, a reviewing court must " ' " 'assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' " ' " (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)

As we will explain, we conclude that there is no reasonable likelihood that the jury understood CALCRIM No. 1191A to create a lower standard of proof for judging whether Mendez committed the charged acts. Importantly, the language of CALCRIM No. 1191A is clear that the charged crimes must be proven beyond a reasonable doubt. The instruction plainly tells the jury that "[i]f you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Lewd or Lascivious Act on a Child Under the Age of 14. *The People must still prove each charge and allegation beyond a reasonable doubt*." (Italics added.) Further, the jury was instructed with CALCRIM Nos. 359 and 220, that Mendez's guilt must be proven beyond a reasonable doubt.

Our conclusion that CALCRIM No. 1191A did not have the effect of lowering the burden of proof for the charged acts is supported by the analysis in *People v. Reliford* (2003) 29 Cal.4th 1007, 1009. In *Reliford*, our Supreme Court considered an argument that the People's burden of proof was lowered when the jury was instructed that

evidence of a defendant's uncharged acts against a *different victim* could be used as propensity evidence if the uncharged acts were proven by a preponderance of the evidence. (*Id*. at pp. 1015-1016.) *Reliford* rejected the argument that it was "reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof" because "[n]othing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense." (*Id*. at p. 1016.) Further, "[t]he instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt,' " and "[a]ny other reading would have rendered the reference to reasonable doubt a nullity." (*Ibid*.) *Reliford* also explained that the instruction was not "too 'complicated' for jurors to apply." (*Ibid*.) "This is not the first time jurors have been asked to apply a different standard of proof to a predicate fact or finding in a criminal trial. . . . As we do in each of those circumstances, we will presume here that jurors can grasp their duty—as stated in the instructions—to apply the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply the reasonable-doubt standard for all other determinations." (*Ibid*., citations omitted.)

Although *Reliford* dealt with an instruction regarding uncharged acts by the defendant against a *different* victim (rather than against the *same* victim, as at issue here), its analysis is persuasive in determining that CALCRIM No. 1191A does not lower the standard of proof when a jury is instructed that an uncharged act against the *same* victim may be determined by a preponderance of the evidence. As was the case with the jury

instructions considered in *Reliford*, CALCRIM No. 1191A clearly informs the jurors that they are to use a preponderance-of-the-evidence standard in assessing uncharged acts, but they are to use a beyond-a-reasonable-doubt standard in assessing the charged acts, as it states that "[t]he People must still prove each charge and allegation beyond a reasonable doubt." Further, the jury instructions set forth the beyond-a-reasonable-doubt standard of proof in CALCRIM Nos. 359 and 220. As *Reliford* observed, jurors are presumed to be able to "grasp their duty—as stated in the instructions—to apply the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply the reasonable-doubt standard for all other determinations." (*Reliford*, *supra*, 29 Cal.App.4th at p. 1016) We perceive no reason why jurors would not be able follow that instruction as stated in CALCRIM No. 1191A.

Mendez relies on *People v. Cruz* (2016) 2 Cal.App.5th 1178 (*Cruz*), to argue that the instruction lowers the standard of proof, but *Cruz* is inapposite. In *Cruz*, instead of properly informing the jury that it could use other *charged* offenses as propensity evidence only if those charged offenses were proven beyond a reasonable doubt,[7] the jury was told that it could apply a preponderance of the evidence standard when those charged offenses were being used as propensity evidence, but was it then required to use a beyond a reasonable doubt standard to determine whether the defendant was guilty of

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7 Our Supreme Court in *People v. Villatoro* (2012) 54 Cal.4th 1152, 1167-1168 established that other *charged* acts could be considered by the jury as propensity evidence under Evidence Code section 1108, but the jury must apply a beyond a reasonable doubt standard of proof to those charged acts, even when using those charged acts as propensity evidence for other charged acts.

the same charged offense.[8] (*Cruz*, at pp. 1185-1186.) As *Cruz* sensibly pointed out, "It would be an exaggeration to say the task required of the jury by the instruction given in this case . . . was logically impossible. A robot or a computer program could be imagined capable of finding charged offenses true by a preponderance of the evidence, and then finding that this meant the defendant had a propensity to commit such offenses, while still saving for later a decision about whether, in light of all the evidence, the same offenses have been proven beyond a reasonable doubt. A very fastidious lawyer or judge might even be able to do it. But it is not reasonable to expect it of lay jurors. We believe that, for practical purposes, the instruction lowered the standard of proof for the determination of guilt." (*Id*. at p. 1186.) The instruction in *Cruz* "presented the jury with a nearly impossible task of juggling competing standards of proof during different phases of its consideration of the *same* evidence." (*Id*. at p. 1187, italics added.) Here in contrast, the task which CALCRIM No. 1191A directed the jury to perform was neither logically impossible nor complicated, and it did not concern the *same* evidence. The jury was simply expected to assess *uncharged* offenses under a propensity of the evidence standard, and to assess the *different* evidence concerning the *charged* offenses under a beyond a reasonable doubt standard. A reasonable juror should be able to follow those

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8 As *Cruz* explained, "In effect, the instruction . . . told the jury it should first consider whether the offenses charged in counts 1, 2, and 3 had been established by a preponderance of the evidence, while holding its ultimate decision on the same offenses in suspension. Then the jury was required to decide whether the preponderance finding showed a propensity, and whether this propensity, in combination with the other evidence, proved those offenses a second time, this time beyond a reasonable doubt." (*Cruz*, *supra*, 2 Cal.App.5th at pp. 1185-1186.)

instructions, even when the charged and uncharged offenses are described in the testimony of a single victim.

Mendez acknowledges that the contention that CALCRIM No. 1191A effectively lowers the burden of proof when a victim testifies about uncharged acts as well as about charged acts was considered and rejected by the majority opinion in *People v. Gonzales* (2017) 16 Cal.App.5th 494 (*Gonzales*) [considering instruction with CALCRIM No. 1191 prior to revision to create CALCRIM Nos. 1191A and 1191B]. As we do here, *Gonzales* rejected the argument that when evidence of uncharged acts comes from the testimony of the victim of the charged acts, instructing that the jury may consider the uncharged offenses if the People have proved them by a preponderance of the evidence may result in "the jury misapplying the burden of proof for the charged offenses." (*Id*. at p. 502.) *Gonzales* cited our Supreme Court's opinion in *Reliford, supra*, 29 Cal.4th at pp. 1011-1016, and explained that CALCRIM No. 1191 did not lower the burden of proof for the charged offenses when the victim also testifies to uncharged offenses because it "instructs that the uncharged offenses are only one factor to consider; that they are not sufficient to prove by themselves that the defendant is guilty of the charged offenses; and that the People must still prove the charged offenses beyond a reasonable doubt." (*Gonzales*, at p. 502.)

Mendez advocates that instead of following the analysis of the majority opinion in *Gonzales*, we should follow Justice Perren's concurring opinion in *Gonzales*. Justice Perren explained that, in his view, when a jury is instructed on how to consider propensity evidence admitted under Evidence Code section 1108, "a problem arises

where . . . the proffered evidence [of uncharged acts] consists solely of the victim's own testimony." (*Gonzales, supra*, 16 Cal.App.5th at p. 506, conc. opn. of Perren, J.) As the concurrence explained, telling the jury that "it could assign a lesser degree of veracity to the victim's testimony regarding the uncharged offenses, and then consider whether that evidence supports a finding of proof beyond a reasonable doubt of her veracity as to the charged offenses" is an "exercise in 'mental gymnastics' " similar to that disapproved in *Cruz, supra*, 2 Cal.App.5th 1178. (*Gonzales*, at p. 506, conc. opn. of Perren, J.) The instruction therefore "confuses the issue and threatens to undermine confidence in the result." (*Id*. at p. 507.) To remedy this problem, the concurrence proposed that when a victim testifies to charged and uncharged conduct, the jury should be instructed that the uncharged acts should be used as propensity evidence *only* if proven beyond a reasonable doubt (as set forth for *charged* acts in CALCRIM No. 1191B). (*Ibid*.) We note, however, that the concurrence ultimately concluded that in the circumstances presented, instructional error did not prejudice the defendant because (1) "[a]lthough the instruction was erroneous, it did not 'lower[ ] the standard of proof for the determination of guilt' as the instruction did in *Cruz"* in that "the instructions made clear that the charged offenses had to be proven beyond a reasonable doubt," and (2) "the evidence supporting the charged offenses was substantial." (*Gonzales*, at p. 507, conc. opn. of Perren, J.)

Although we understand the views expressed in Justice Perren's concurring opinion in *Gonzales*, we decline to follow them here to conclude that it was error to instruct with CALCRIM No. 1191A with respect to uncharged acts described in the testimony of the victims of the charged acts. As we have explained, courts must presume

that juries are capable of following instructions as to differing standards of proof, and the task of applying a lower standard of proof to uncharged acts described by the victim of charged acts is not so difficult or illogical as to be beyond the capabilities of a reasonable juror and does not require the type of impossible mental gymnastics at issue in *Cruz* where the *same* testimony was to be considered under two different standards of proof.

Accordingly, we reject Mendez's contention that CALCRIM No. 1191A effectively lowered the standard of proof for the charged sexual offenses and violated his constitutional right to due process.

B. *The Sentence of 45-Years-to-Life Imposed on Mendez Is Not Cruel and Unusual Punishment*

Mendez contends that "in light of his advanced age (sentencing occurred one month before his 70th birthday), his health problems, his lack of any criminal history, and his 'very low' risk of recidivism based on his score on the Static-99R test," a sentence of 45 years to life (which statistically guarantees he will die in prison), is cruel and unusual punishment in violation of the federal and state Constitutions.[9] We apply a de novo standard of review in considering Mendez's argument. (*People v. Em* (2009) 171 Cal.App.4th 964, 971 [" 'Whether a punishment is cruel or unusual is a question of law for the appellate court' "].)

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9 The probation officer's report states that Mendez suffers from diabetes, high cholesterol and high blood pressure.

1. *Applicable Legal Standards*

As a first step in analyzing whether Mendez's sentence constitutes cruel and unusual punishment, we set forth the applicable legal standards.

"The Eighth Amendment to the United States Constitution applies to the states. (*People v. Caballero* (2012) 55 Cal.4th 262, 265, fn. 1.) It prohibits the infliction of "cruel *and* unusual" punishment. (U.S. Const., 8th Amend., italics added.) Article I, section 17 of the California Constitution prohibits infliction of '[c]ruel *or* unusual' punishment. (Italics added.) The distinction in wording is 'purposeful and substantive rather than merely semantic. [Citations.]' (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.) As a result, we construe the state constitutional provision 'separately from its counterpart in the federal Constitution. [Citation.]' (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.)" (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82 (*Palafox*).) We must therefore discuss the standards under both the state and federal Constitutions.

a. *The California Constitution*

"A prison sentence will violate the prohibition against cruel or unusual punishment under the California Constitution ([Cal. Const.,] art. I, § 17) where ' "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." ' (*People v. Dillon* (1983) 34 Cal.3d 441, 478; see also *People v. Boyce* (2014) 59 Cal.4th 672, 718-719.) A defendant has a 'considerable burden' to show a punishment is cruel or unusual under the California Constitution. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) 'The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly

encroach on matters which are uniquely the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment.' (*Ibid.*) Thus, ' "[o]nly in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." ' (*People v. Meneses* (2011) 193 Cal.App.4th 1087, 1093.)" (*People v. Reyes* (2016) 246 Cal.App.4th 62, 86 (*Reyes*).) " '[F]indings of disproportionality have occurred with exquisite rarity in the case law.' " (*In re Nuñez* (2009) 173 Cal.App.4th 709, 725.) " ' "Only when the punishment is out of all proportion to the offense and is clearly an extraordinary penalty for a crime of ordinary gravity committed under ordinary circumstances, do the courts denounce it as unusual." ' " (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1390.)

Under California law, a three-pronged test is applied to determine whether a particular sentence is unconstitutionally disproportionate to the offense for which it is imposed. In the first prong, we "examine 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' (*In re Lynch* (1972) 8 Cal.3d 410, 425; *People v. Dillon*, *supra*, 34 Cal.3d at p. 479; *People v. O'Connor* (1986) 188 Cal.App.3d 645, 648.) 'A look at the nature of the offense includes a look at the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of defendant's acts. A look at the nature of the offender includes an inquiry into whether "the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." ' (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 88.)" (*Reyes*, *supra*, 246

Cal.App.4th at pp. 86-87.) In the second prong, we "compare the punishment imposed with punishments prescribed by California law for more serious offenses." (*Reyes*, at p. 87, citing *Lynch*, at pp. 426-427.) Finally, in the third prong, "we compare the punishment imposed with punishments prescribed by other jurisdictions for the same offense." (*Reyes*, at p. 87, citing *Lynch*, at pp. 427-429.) "The importance of each of these prongs depends upon the facts of each specific case. . . . Indeed, we may base our decision on the first prong alone." (*People v. Johnson* (2010) 183 Cal.App.4th 253, 297, citation omitted.)

b. *The United States Constitution*

"[I]t is now firmly established that '[t]he concept of proportionality is central to the Eighth Amendment,' and that '[e]mbodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." ' " (*In re Coley* (2012) 55 Cal.4th 524, 538, quoting *Graham v. Florida* (2010) 560 U.S. 48, 59 (*Graham*).) "[T]he Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' " (*Graham*, at pp. 59-60.)

A three-part approach is applied to determine whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime under the federal Constitution. "A court must begin by comparing the gravity of the offense and the severity of the sentence. . . . '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the

defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. . . . If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." (*Graham*, *supra*, 560 U.S. at p. 60, citations omitted.)

Under the federal Constitution, "[o]utside the death penalty context, ' "successful challenges to the proportionality of particular sentences have been exceedingly rare." ' . . . There is no question that 'the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts." ' . . . It is for this reason that when faced with an allegation that a particular sentence amounts to cruel and unusual punishment, '[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes. . . .' " (*Reyes*, *supra*, 246 Cal.App.4th at p. 83, citations omitted.)

As shown by the authorities we have cited above, the federal and state constitutional standards for assessing whether a statutorily prescribed sentence amounts to cruel and/or unusual punishment, the standards are very similar, and "the federal Constitution affords no greater protection than the state Constitution." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) "Although articulated slightly differently, both standards prohibit punishment that is 'grossly disproportionate' to the crime or the individual culpability of the defendant." (*People v. Mendez* (2010) 188 Cal.App.4th 47, 64.) Moreover, "[u]nder both standards, the court examines the nature of the offense and

the defendant, the punishment for more serious offenses within the jurisdiction, and the punishment for similar offenses in other jurisdictions." (*Ibid*.) Although we "construe the state constitutional provision 'separately from its counterpart in the federal Constitution[,]' . . . [t]his does not make a difference from an analytic perspective." (*Palafox*, *supra*, 231 Cal.App.4th at p. 82, citation omitted.) "The touchstone in each is gross disproportionality." (*Ibid.*)

2. *Mendez's Sentence Is Not Cruel and Unusual Punishment*

As the first component of his disproportionality argument, Mendez contends that his "offenses did not involve actual physical harm or threats of physical harm to the victims, nor did they involve acts of rape, sexual penetration, oral copulation, or kidnapping." Mendez points out that "[m]ost of the touching occurred over the victims' clothing; there was minimal skin to skin contact." Mendez's argument is targeted at the "nature of the offense," which is judged based on " 'the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of defendant's acts.' " (*Reyes*, *supra*, 246 Cal.App.4th at p. 87.) Mendez argues that his sentence is disproportionately harsh in light of the nature of his crimes. As we will explain, we disagree.

Here, although Mendez did not commit acts such as rape or oral copulation, and he did not issue any direct threats to the victims, his conduct was nevertheless serious and harmful. When sex crimes against children are at issue, the defendant does "not have to hurt [the victim] in order to do permanent psychological damage." (*Reyes*, *supra*, 246 Cal.App.4th at p. 85.) "Above and beyond the protection afforded to all victims of sexual

assault, the Legislature has determined that children are uniquely susceptible to 'outrage' and exploitation. Hence, special laws on the subject of sex with children have been enacted. They expand the kinds of acts which may be deemed criminal sexual misconduct, and they generally operate without regard to force, fear, or consent." (*People v. Scott* (1994) 9 Cal.4th 331, 341-342.) "Viewed along a spectrum, we may find murder, mayhem and torture among the most grave of offenses and petty theft among the least. Considered in this context, lewd conduct on a child may not be the most grave of all offenses, but its seriousness is considerable. It may have lifelong consequences to the well-being of the child." (*People v. Christensen* (2014) 229 Cal.App.4th 781, 806.) Children are particularly vulnerable victims, and "great deference is ordinarily paid to legislation designed to protect children, who all too frequently are helpless victims of sexual offenses." (*In re Wells* (1975) 46 Cal.App.3d 592, 599.) Put simply, a sex offense against a young child is a grave offense because of the vulnerable nature of the victim and the risk of *psychological* harm to the child, regardless of the exact physical conduct involved or the lack of any associated physical injury. It is reasonable to conclude that a granddaughter would incur serious psychological injury by being the victim of repeated lewd acts committed by her own grandfather, who was supposed to be acting as her caregiver rather than as a predator, regardless of exactly what type of lewd acts were performed. Indeed, at sentencing, two of the granddaughters commented on the lasting psychological harm from Mendez's acts. Viewed in this light, Mendez's sentence is not grossly disproportionate to the nature of his offenses.

Moreover, the fact that Mendez received life sentences in this case derives not from the fact that he committed lewd acts against a child, but from the fact that he committed lewd acts against *multiple* victims. In specifying that a defendant guilty of committing lewd acts against multiple child victims is deserving of the more serious punishment of an indeterminate life term, the Legislature has made the reasonable judgment that such a defendant is more culpable than other defendants. (§§ 288, subd. (a), 667.61, subds. (b), (c)(8), (e)(4).) Thus, although Mendez's lewd acts were not particularly aggravated with respect to the *type* of touching involved, those acts took on an aggravated quality because he committed them against multiple victims and on multiple occasions. Accordingly, the sentence imposed on Mendez was not disproportionate to the nature of his crimes, which were aggravated and serious crimes due to the fact that they were directed at vulnerable children and multiple victims.

The second component of Mendez's disproportionality argument focuses on the "nature of the offender," which may include " 'an inquiry into whether "the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." ' " (*Reyes, supra*, 246 Cal.App.4th at p. 87.) Mendez points out that "[h]e had no prior criminal record," he was steadily employed and in a long-term marriage throughout his life, and the Static-99R test administered by the probation officer showed he had a " 'very low' " risk of committing another sexual offense. In our assessment, these personal characteristics do not render Mendez's sentence grossly disproportionate so as to make it unconstitutional. As we have explained, Mendez engaged in a long term course of

conduct against three vulnerable child victims. Despite Mendez's respectable life history, the sentence of 45 years to life is justified by his commission of continuing sexual offenses against his three young granddaughters, which was aggravated and harmful conduct. (See *People v. Baker* (2018) 20 Cal.App.5th 711, 725 [rejecting a cruel and unusual punishment argument for a 15-years-to-life sentence for defendant's three acts of molestation against his six-year-old niece because even though the defendant had an " 'insignificant criminal record' and no prior history of sex crimes" those favorable factors did not outweigh the other factors, including the psychological harm caused by the crime against a vulnerable victim].) The crimes that Mendez committed were not a one-time aberration in an otherwise respectable life. Instead, the crimes took place over the course of several years, during which Mendez had the chance to reflect on his conduct and to rectify his behavior but failed to do so.

Finally, in arguing that his sentence is constitutionally disproportionate, Mendez contends that the sentence of 45 years to life is especially harsh as applied to him because of his advanced age, in that as a man of almost 70 years of age at the time of sentencing, he is statistically guaranteed to die in jail. We reject this argument because the fact that Mendez will likely die in jail is primarily a result of the fact that Mendez chose to commit a series of serious offenses when he was in his late 60's and in poor health, rather than a reflection of any unusual severity in the sentence itself. We note that the trial court exercised restraint in sentencing because it decided to impose only a single 15-years-to-life sentence for each of the three victims. Although Mendez was convicted of 16 separate counts, each of which could have justified the imposition of a sentence of 15

years to life, the trial court selected the *minimum* sentence available to it under the applicable law while nevertheless acknowledging that there were three separate victims of Mendez's crimes. Thus, although Mendez will be in prison for the rest of his life, that result is not because of an unduly harsh sentence, but because Mendez committed crimes when he was already an older man.

The second and third inquiries in a proportionality analysis under the federal and California constitutions concern comparisons with the punishment for more serious offenses in California and for similar offenses in other jurisdictions. (*Graham, supra*, 560 U.S. at p. 60; *Reyes*, *supra*, 246 Cal.App.4th at p. 87.) Mendez makes no attempt to address either of these issues. We take Mendez's lack of argument on those issues as a concession that his sentence withstands a constitutional challenge on either basis, as he bears the burden to establish disproportionality. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231 ["defendant makes no effort to compare his sentence with more serious offenses in California or with punishments in other states for the same offense, which we take as a concession that his sentence withstands a constitutional challenge on

either basis"]; *People v. Crooks* (1997) 55 Cal.App.4th 797, 808 [defendant bears burden of establishing disproportionality].)[10]

In sum, we conclude that Mendez's sentence of 45 years to life for 16 counts of committing lewd acts on three children under the age of 14 is not cruel and unusual punishment.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.

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10 Were we to substantively consider whether the sentence imposed on Mendez is proportionate to the sentence authorized in other jurisdictions instead of relying on Mendez's implied concession on the issue, we would rely on the Attorney General's citation to a representative sample of statutes from other jurisdictions which set forth similar punishment for lewd acts against children. (See, e.g., Kan. Stat. Ann. §§ 21-5506(b)(3)(A); 21-6627(a)(1)(C) [term of 25 years to life for lewd touching of a child under age of 14]; Nev. Rev. Stat. Ann. § 201.230(2) [term of 10 years to life for lewdness with child under age of 14].)